(8) No. 95-1858

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

DENNIS C. VACCO, Attorney General of the State of New York; GEORGE E. PATAKI, Governor of the State of New York; and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

—v.—

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBRUN, M.D.; and HOWARD A. GROSSMAN, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Victoria A. Graffeo*
Solicitor General

Barbara Gott Billet
Deputy Solicitor General

Daniel Smirlock
Assistant Attorney General

Lucia M. Valente
Chief Special Counsel
to the Attorney General

* *Counsel of Record*

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Petitioners
Vacco and Pataki
120 Broadway
New York, New York 10271
(212) 416-8050

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I

THE SECOND CIRCUIT'S UNPRECEDENTED CONCLUSION THAT ASSISTED SUICIDE AND REFUSAL OF LIFE-PROLONGING TREATMENT ARE CONSTITUTIONALLY INDISTINGUISHABLE WARRANTS DEFINITIVE EXAMINATION BY THIS COURT

The central strategy of respondents' brief in opposition to the petition for certiorari is to conflate an analysis under the Due Process Clause with the elements of the asserted equal protection claim, and to hinge the whole on euphemistic language which seeks to obscure the essential differences between refusing life-prolonging medical treatment and committing suicide. Because, respondents argue, New York recognizes "broad patient autonomy," including in certain circumstances the so-called right to "hasten death," the State must be viewed as having "disavowed an absolute commitment to preserving life" (Opposition, p. 7) such that, as a matter of equal protection, the right to physician assisted suicide must accompany and coexist with the right to refuse life-prolonging medical treatment.

Unquestionably, the centerpiece of the Second Circuit's decision is its conclusion that there is no legal difference between the determination to refuse or withdraw artificial life support (an act which by no means suggests the refusal or withdrawal of further medical care), and the determination to seek a physician's assistance in killing oneself. Significantly, respondents do not challenge the historical overview of assisted suicide provided in the petition for certiorari (Petition, p. 6-9). That overview indicates that the conclusion of the court below is without merit, and that indeed, the Second Circuit has rewritten New York's law in the absence of any legitimate constitutional claim, something the federal courts may not do.

As respondents suggest, New York recognizes the common law right of a competent adult patient to decline medical treatment. *Matter of Storar*, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, *cert. denied*, 454 U.S. 858 (1981). However, this common law right cannot be characterized as one to "hasten death." To the contrary, in the very case that articulated the right, the New York Court of Appeals also stated that "[t]he State has a legitimate interest in protecting the lives of its citizens. . . . It may, by statute, prohibit them from engaging in specified activities, including medical procedures which are inherently hazardous to their lives." *Id.* at 377, 420 N.E.2d at 71. In *Matter of Eichner*, decided with *Storar*, the Court again stated:

> In other cases the State may be able to assert additional interests, such as, prevention of suicide or, perhaps, protection of minor children or dependents. Those concerns are inapplicable here. Brother Fox's condition [a permanent vegetative state] was not self-inflicted.

Id. at 377 n.6, 420 N.E.2d at 71 n.6.

The right to refuse medical treatment, the New York Court of Appeals has made clear, is not an overnight creation, but rather is the result of long-established common law principles. *Id.* at 376-77, 420 N.E.2d at 71. As demonstrated in the petition for certiorari (Petition, p. 6), the common law pedigree of the prohibition against assisted suicide is as well or better established, dating from colonial times. The simultaneous existence of the common law right and the common law prohibition indicates what common sense likewise suggests—that refusal of treatment and assisted suicide are not identical. They are, in this Court's terms, "things which are different in fact," *Plyler v. Doe*, 457 U.S. 202, 216 (1982), and that one is permitted does not mean, as a matter of constitutional law, that the other must be permitted as well.

The Second Circuit's failure to distinguish legally between refusal of treatment and assisted suicide, a failure now urged

upon this Court by respondents, is unprecedented, and indeed is in stark conflict with the conclusion reached by New York's highest state court as well as other state courts of last resort which have visited the issue. *See, e.g., Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 227, 551 N.E.2d 77, 82 (1980) ("merely declining medical care, even essential treatment, is not considered a suicidal act"); *In re Browning*, 568 So.2d 4, 14 (Fla. 1990) ("suicide is not an issue when . . . the discontinuation of life support 'in fact will merely result in . . . death, if at all, from natural causes' ") (citation omitted); *Rasmussen v. Fleming*, 154 Ariz. 207, 218, 741 P.2d 674, 685 (1987) ("[a]sserting the right to refuse medical treatment is not tantamount to committing suicide"); *In re Gardner*, 534 A.2d 947, 955-56 (Me. 1987) (the "decision not to receive [medical] procedures, far from constituting suicide, is a choice to allow to take its course the natural dying process"); *In re Conroy*, 98 N.J. 321, 350-51, 486 A.2d 1209, 1224 (1985) ("declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide"). *Accord Van Holden v. Chapman*, 87 A.D.2d 66, 70, 450 N.Y.S.2d 623, 627 (4th Dep't 1982) ("[e]ven superficial comparison of the right to decline medical treatment with the right to take one's life illustrates their essential dissimilarity").[1]

[1] The Second Circuit's finding of no significant distinction between refusal or withdrawal of artificial life support and suicide is a clear departure from the thinking of New York's Legislature as well as its highest court. This is evidenced by, among other things, New York Public Health Law § 2989(3), which, as part of the statutory provision on health care agents and proxies adopted by the Legislature in 1990, unequivocally states: "This article is not intended to permit or promote suicide, assisted suicide, or euthanasia." N.Y. Pub. Health Law § 2989(3) (McKinney 1993). *See also* New York State Task Force on Life and the Law, *Do Not Resuscitate Orders: The Proposed Legislation and Report of the New York State Task Force on Life and the Law*, at v (April 1986) (indicating a presumption in favor of life in that "[t]he [DNR] legislation explicitly affirms the presumption under existing law that all patients in the event of cardiac or respiratory arrest consent to the provision of CPR").

In light of the foregoing, it is difficult to credit respondents' blithe assertion that review is "unnecessary because the decision below is correct" (Opposition, p. 10). The reasoning of the decision below is unprecedented, and whether or not this Court would view it as correct, it undoubtedly presents questions of fundamental importance, something which respondents at no point deny.[2]

It is equally difficult to credit respondents' perfunctory argument that "review by this Court at this time is premature" (Opposition, p. 9). The Second Circuit and the Ninth Circuit, constituting two of the most populous circuits in the nation, have each grappled with the issue of physician assisted suicide, the Ninth Circuit in three separate opinions. *See Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995) (reversing district court), *rev'd*, 79 F.3d 790 (9th Cir. 1996) (en banc) (reversing prior panel's decision and affirming district court), *reh'g en banc denied*, 1996 WL 315922 (9th Cir. June 12, 1996) (en banc) (rejecting sua sponte request of active judge for rehearing en banc).[3] A significant number of

[2] Nor can respondents successfully argue against a grant of review on the claimed basis that a physician's decision to prescribe lethal drugs to a terminally ill patient is a private matter in which the State has no right to intervene (Opposition, pp. 15-16, 20). State regulation of physician conduct is an essential feature of medical care. *See, e.g.*, N.Y. Educ. Law § 6530(3) (McKinney Supp. 1994) (authorizing discipline of physicians). In the context of the prescription and administration of powerful drugs, this Court has held that "the State has broad police powers in regulating the administration of drugs by the health professions," and has observed that "the State no doubt could prohibit entirely the use of particular Schedule II drugs." *Whalen v. Roe*, 429 U.S. 589, 603 & n.30 (1977) (upholding New York's triplicate prescription system for dispensing controlled substances). *See also People v. Privitera*, 23 Cal.3d 697, 705, 591 P.2d 919, 923 (concluding that "the state has the power to ban a drug with a recognized medical use because of its potential for abuse"), *cert. denied*, 444 U.S. 949 (1979).

[3] In this regard, it is noteworthy that the Ninth Circuit's analysis on this issue is fundamentally at odds with that of the Second Circuit. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508-09 & n. 2 (1992) (certiorari granted and dispute characterized as a "conflict" where numer-

state courts of last resort have addressed the legal distinction between suicide and withdrawal of life support. *See supra*. *See also People v. Kevorkian*, 447 Mich. 436, 482, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995); *DeGrella ex rel. Parrent v. Elston*, 858 S.W.2d 698, 707 (Ky. 1993); *In re P.V.W.*, 424 So.2d 1015, 1022 (La. 1982); *In re Quinlan*, 70 N.J. 10, 43, 355 A.2d 647, 665, *cert. denied*, 429 U.S. 922 (1976). This is simply not a case where "further study" is warranted to avoid "premature adjudication of constitutional principles" (Opposition, p. 9). To the contrary, the life and death issues involved cry out for a definitive examination by this Court.

II

THE DECISION BELOW CONFLICTS WITH A DECISION OF THE SUPREME COURT OF MICHIGAN

As demonstrated in the petition for certiorari (Petition, pp. 14-15), the Second Circuit's decision conflicts with the decision of the Supreme Court of Michigan in *People v. Kevorkian*, 447 Mich. 436, 527 N.W.2d 714 (1994), *cert. denied*, 115 S.Ct. 1795 (1995). Nothing respondents offer in their brief (Opposition, pp. 7-9) vitiates this conflict. The Michigan Supreme Court's conclusion that the asserted equal protection right to assisted suicide cannot be derived from the acknowledged "right enjoyed by terminally ill persons who opt to forgo or discontinue life-sustaining medical treatment" because "the two situations are not the same for purposes of constitutional analysis," *id.* at 480 n. 57, 527 N.W.2d at 732 n. 57, is a holding rather than the dictum respondents claim it to be, and of course conflicts with the Second Circuit's opposite conclusion.[4] *See generally Washington v. Yakima Indian*

ous courts "agreed with [the] analysis of the Third Circuit, which differed from the analysis of the Supreme Court of New Jersey").

[4] Additionally, the suggestion that any conflict with the Michigan court's holding has "evaporated" with the expiration of the Michigan statute (Opposition, p. 8) ignores the very underpinnings of the Court's decision, which are independent of the statute itself, and which were applied equally to the common law challenges raised. Indeed, quoting Justice Jackson, Justice Boyle of the Michigan Supreme Court noted that "a judicial decision has a force of its own. 'The principle then lies about like a loaded weapon . . . . Every repetition imbeds that principle more deeply in our law' . . . ." *Kevorkian*, 447 Mich at 502, 527 N.W.2d at 742 (Boyle, J., concurring in part and dissenting in part). *See also id.* at 477, 527 N.W.2d at 730 (analyzing the constitutional issue in terms of "evolution of tradition" and "historical precepts").

Nation, 439 U.S. 463, 467-68 n.5 (1978) (review undertaken in a case in which the district court rejected the constitutional claims but the circuit court did not reach the question of whether the application of the challenged statute deprived it of equal protection of the laws).

Nor can respondents plausibly contend (Opposition, p. 8) that the *Kevorkian* decision depends on the fact that "[a]t the time the Michigan Supreme Court ruled, Michigan's statutory law was less protective" than that of New York, such that in Michigan there was no disparity between the treatment of those who sought to refuse care and those who sought assisted suicide. The *Kevorkian* decision itself establishes that respondents are incorrect on this point. In Michigan, as in New York, there is and was a right, rooted in the common law, to refuse or discontinue medical treatment. *See Kevorkian*, 447 Mich. at 466-474, 527 N.W.2d at 726-729. The equal protection analysis conducted by the Michigan court did not, as respondents suggest (Opposition, p. 8), turn on a careful examination of the "obstacles to patient choice" presented by the Michigan common law. Rather, the court simply acknowledged that there is a right to refuse or discontinue life-sustaining medical treatment and concluded, for both due process and equal protection purposes:

> that persons who opt to discontinue life-sustaining medical treatment are not, in effect, committing suicide. There is a difference between choosing a natural death summoned by an uninvited illness or calamity, and delib-

erately seeking to terminate one's life by resorting to death-inducing measures unrelated to the natural process of dying.

Id. at 472-73, 527 N.W.2d at 728-29.

The Michigan Supreme Court, in other words, squarely held that refusal of treatment and assisted suicide "are not the same for purposes of constitutional [equal protection] analysis." *Id.* at 480 n.57, 527 N.W.2d at 732 n.57. The court below held precisely the opposite. The conflict is inescapable and only this Court can resolve it.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: Albany, New York
July 9, 1996

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Petitioners
Vacco and Pataki
120 Broadway
New York, New York 10271
(212) 416-8050

Victoria A. Graffeo*
Solicitor General

Barbara Gott Billet
Deputy Solicitor General

Daniel Smirlock
Assistant Attorney General

Lucia M. Valente
Chief Special Counsel
to the Attorney General

* *Counsel of Record*